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Joel Slawotsky

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INTRODUCTION

Corporate successor liability for punitive damages is a legal issue that will arise more frequently because both product longevity and global corporate transformations are rapidly growing.[1] Merger and acquisition activity reached previously unheard of levels in the 1980s[2] and, after a brief slowdown in the early 1990s, has grown to unprecedented levels. Indeed, as we close the decade, the deals announced are staggering in both frequency and dimension.[3] The entities that result from various business combinations, known as "successors,"[4] face potential liability for tortious conduct committed by their acquired corporations.

A tremendous amount of litigation has centered separately on successor liability and on punitive damages, and the U.S. Supreme Court has recently ruled on constitutional challenges to such damages.[5] However, relatively few courts have decided whether a successor corporation should be liable for punitive damages.[6] This

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* The author, a former law clerk to the Honorable Charles H. Tenney, U.S.D.J., S.D.N.Y., is an attorney practicing litigation in New York City. He received his J.D. from Cardozo School of Law in 1987. He wishes to thank his wife, Julie, for providing the time opportunity that enabled him to work on this article.

1. Barry Levenstam & Daniel Lynch, *Punitive Damages Awards Against Successor Corporations: Deterrent of Malicious Torts or Legitimate Acquisitions?*, 26 TORT & INS. L.J. 27, 28 (1990).

2. Approximately 1.3 trillion dollars was expended during the 1980s on mergers and acquisitions. *See Strategic Deals Can Be Good Building Blocks*, BUS. WK., Jan. 15, 1990, at 94.

3. For example, on November 30, 1998, Exxon agreed to buy Mobil for 75.3 billion dollars. *See* Christopher Cooper & Steve Liesman, *Historic Deal, Precipitated by Plunging Oil Prices, Signals Shift in Industry*, WALL ST. J., December 2, 1998, at A3.

4. A successor may arise from a variety of transactions, the structure of which may control the successor's liabilities for a predecessor's products. *See infra* notes 7-22.

5. *See, e.g.*, BMW of North America, Inc., v. Gore, 116 S. Ct. 1589, 1604 (1996) (due process challenge); Honda Motor Co. v. Oberg, 512 U.S. 415, 418 (1994) (procedural due process); TXO Prod. Corp. v. Alliance Resources Corp., 509 U.S. 443, 446 (1993) (procedural and substantive due process); Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 7 (1990) (procedural due process); Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 276-77 (1989) (due process and excessive fines).

6. The sole exception is asbestos litigation, where the issue has arisen relatively

article will discuss successor liability for punitive damages and posits that rote application of the corporate law principle that a successor is liable for all of its predecessor's liabilities may be, depending on the circumstances, an improper justification for imposing punitive damages upon a successor, in violation of the fundamental underpinnings of punitive damages.

I. SUCCESSOR LIABILITY

This portion of the article explains the traditional rules of successor liabilities and the exceptions to those rules.

A. Traditional Rules

An individual or entity may acquire a corporation through the following means: (1) merger; (2) share exchange; (3) stock purchase; or (4) asset purchase.[7] In a statutory merger, the assets of the corporation are exchanged for stock in the successor.[8] The buyer succeeds to all debts and liabilities of the purchased entity.[9] Acquisition by merger results in termination of the predecessor and the "new" corporation, or successor, is traditionally liable for the debts and liabilities of the previous entity.[10] Many courts have upheld punitive damages levied against a successor by merger because the tortfeasor, as predecessor, has not been eliminated from participation in the successor but, rather, the merger "merely directs the blood of the old corporation into the veins of the new."[11]

In a share exchange, upon the required vote of the acquired corporation, its shareholders tender their shares for cash, stock or other consideration of the acquiring corporation.[12] The sale of its

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frequently.

7. *See* 15 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 7041-7046 (perm. ed., rev. vol. 1990). In addition, a selling entity can liquidate without providing for unknown claims and the shareholders are not liable except to the extent of their liquidation distribution. *See* RONALD J. GILSON, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS 1095-1141 (1986). Moreover, states typically have statutes that provide a fixed time of only two to three years for creditors to make any claims. *See, e.g.*, DEL. CODE ANN. tit. 8, § 278 (1991); MODEL BUSINESS CORP. ACT § 105 (1979).

8. *See* 15 FLETCHER CYC. CORP. § 7041.

9. *See, e.g.*, N.Y. BUS. CORP. LAW § 906 (McKinney 1986); MODEL BUSINESS CORP. ACT § 76 (1979).

10. *See* 15 FLETCHER CYC. CORP. § 7041.

11. *See* Moe v. Transamerica Title Ins. Co., 21 Cal. App. 3d 289 (1971).

12. *See* 15 FLETCHER CYC. CORP. § 7045 and cases cited therein.

shares does not eliminate the acquired corporation.[13] Further, in contrast to mergers and consolidations, the acquired corporation remains liable for its prior liabilities.[14] If the acquired corporation is subsequently merged or dissolved into the acquiring corporation, the latter will become liable for the acquired corporation's liabilities.[15]

In a stock purchase, a corporation acquires the target corporation's stock as opposed to its assets.[16] As a result, the target corporation becomes a wholly-owned subsidiary of the buyer.[17] The purchaser is protected from liability for the tortious acts of the target corporation in as much as creditors cannot reach the parent purchaser unless there are grounds to pierce the corporate veil.[18] Of course if there are an excessive number of claims arising from the tortious acts of the acquired corporation, the value of the parent's stock holdings may suffer dramatically.

With respect to an asset purchase, the traditional corporate rule is that when one entity sells its assets to a purchaser, the buyer does not assume the liabilities of the acquired company.[19] The traditional rule promotes the mobility of capital, assists in allocation of taxes, and protects creditors and dissenting shareholders.[20] It has also been said that adhering to the traditional rule fosters "a climate of relative certainty and reasonable predictability."[21] Of course, courts will not sanction abuse and may find that "the new organization is simply the older one in guise."[22]

B. The Exceptions to the Non-Liability Rule for the Buyer

While a corporation purchasing the assets of another entity generally will not succeed to the acquired corporation's liabilities,[23] there are four exceptions to this rule: (1) when the buyer expressly or impliedly agreed to assume any or all debts; (2) when the transaction constitutes a de facto merger; (3) when the successor is a mere continuation of the acquired; and (4) when the transaction

13. *See* 15 *id.* § 7045.
14. *See* 15 *id.*
15. *See* 15 *id.*
16. *See* 15 *id.* § 7046.
17. *See* 15 FLETCHER CYC. CORP. § 7046.
18. *See* 15 *id.*
19. *See* Polius v. Clark Equip. Co., 802 F.2d 75 (3d Cir. 1986).
20. *See Polius*, 802 F.2d at 78.
21. *Id.* at 83.
22. *See id.* at 78.
23. *See* 15 FLETCHER CYC. CORP. § 7122.

is a conveyance made in an attempt to fraudulently evade liability.[24] Courts have also expanded these above four exceptions to the traditional rule of non-liability for the buyer in an asset purchase to include three additional exceptions known as (1) "continuation of enterprise,"[25] (2) "product line,"[26] and (3) duty to warn.[27]

1. Assumption of Liabilities

The first exception occurs in situations where the buyer expressly or impliedly agreed to assume some or all of the debts and liabilities of the seller.[28] Such an agreement may, depending on the intent of the parties, confer liability on the purchaser successor.[29] If the buyer's assumption is broad in nature, liability will transfer to the buyer. If the assumption clause is narrow and contains limits or disclaimers, liability may not vest with the successor.[30] Furthermore, despite the fact that a general assumption clause does not expressly state that the buyer will assume liability, the courts may find that such a clause nevertheless serves to impose liability on the purchaser.[31] In *Kessinger v. Grefco, Inc.*,[32] the court held that an asset-sale agreement in which the purchaser explicitly assumed and agreed "to pay, perform and discharge all debts, obligations, contracts and liabilities" of the seller included unforeseen product liability claims.[33] The court rejected the purchaser's claim that the purchase terms were ambiguous because they did not reference product liability claims.[34]

In *Baker v. National State Bank*, the New Jersey Superior Court simply looked at the successor as a product of a statutory merger, which saddled the successor with "all [of] the obligations and

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24. *See* 15 *id.*

25. *See* Turner v. Bituminous Casualty Co., 244 N.W.2d 873 (Mich. 1976).

26. *See* Ray v. Alad Corp., 560 P.2d 3 (Cal. 1977).

27. *See infra* text accompanying notes 121-22.

28. In certain situations, courts have held that statutes that require successor corporations to be liable for all liabilities and obligations of corporations that have merged or consolidated also contemplate that a successor corporation will be liable for punitive damages. *See* Schmidt v. Financial Resources Corp., 680 P.2d 845 (Ariz. Ct. App. 1984).

29. *See* Bouton v. Litton Indus., Inc., 423 F.2d 643 (3d Cir. 1970). *See also* Douglas v. Bank of New England/Old Colony, 566 A.2d 939 (R.I. 1989).

30. *See* Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817 (D. Colo. 1968) (finding no express or implied transfer of product liability).

31. *See* Hanlon v. Johns-Manville Corp., 599 F. Supp. 376, 378 (N.D. Iowa 1984).

32. 875 F.2d 153 (7th Cir. 1989).

33. *Kessinger*, 875 F.2d at 155 (analyzing under Pennsylvania and Illinois law).

34. *Id.*

liabilities" of the predecessor.[35] In affirming that court's decision, the New Jersey Supreme Court concluded that the successor was indeed liable for punitive damages arising from the acts of its predecessor.[36]

Upon completion of a statutory merger, the successor assumes the liabilities of the predecessor. As stated in the Delaware General Corporation Law, "[w]hen any merger or consolidation shall become effective . . . all debts, liabilities and duties of the respective constituent corporations shall thence forth attach to said surviving or resulting corporation, and may be enforced against it to the same extent . . . ."[37] Other states are in accord with the Delaware statute on mergers.[38] Courts who do not analyze a transaction beyond its form will likely impose punitive damages on a successor notwithstanding the lack of any wrongful conduct on behalf of the successor corporation.[39]

2. *De Facto Merger*

The next exception to the traditional rule of non liability for purchaser successors is the de facto merger doctrine. Under this exception, if the transaction *constitutes* a merger, liability of the predecessor will be conferred upon the successor irrespective of the characterization of the transaction.[40] The purpose of the exception in imposing liability upon the successor is to prevent the predecessor from evading liability through mere changes in corporate form.[41] Factors such as (1) identical shareholders, management, and personnel in the predecessor and the successor corporations, (2) the dissolution of the predecessor, and (3) the assumption of business liabilities by the successor are factors which tend to suggest a de facto merger.[42] Moreover, an exchange of the predecessor's assets for the successor's stock has been

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35. 711 A.2d 917, 929 (N.J. Super. Ct. 1998).

36. Baker v. National State Bank, 736 A.2d 462 (Nov. 1999). The court did not go beyond the form of the transaction. *Id. But see* Brotherton v. Celotex Corp., 493 A.2d 1337, 1341 (N.J. 1985), *infra* notes 171-76 and accompanying text (analyzing the transaction beyond its mere form).

37. DEL. CODE ANN. tit. 8, § 259 (1991).

38. *See, e.g.*, Parra v. Production Machine Co., 611 F. Supp. 221, 224 (E.D.N.Y. 1985) ("A merger contemplates the absorption of one corporation by another with the latter retaining the absorbed corporation's name and corporate identity.").

39. *See, e.g., Baker*, 736 A.2d at 465.

40. *See* 15 FLETCHER CYC. CORP. § 7045.10.

41. *See* 15 *id.*

42. *See* Shannon v. Samuel Langston Co., 379 F. Supp. 797, 799 (W.D. Mich. 1974).

found, under certain circumstances, to amount to a merger invoking the exception.[43] De facto mergers will result in liability being imposed upon the successor for punitive damages based on the tortious conduct of the predecessor.[44]

This exception was recognized by the district court in *Shannon v. Langston Co.*, a diversity case decided under New Jersey law.[45] In *Shannon*, an asset purchase bore resemblance to a statutory merger because payment for the purchase consisted only of the successor's stock and the acquired corporation dissolved shortly after the transaction.[46] The court evaluated four factors in determining whether the transaction amounted to a de facto merger.[47] First, the court observed the continuity of stockholder interest from the predecessor to the successor corporations.[48] Second, the court noted that the acquired entity liquidated and dissolved as soon as "legally and practically as possible."[49] Third, the court looked for a link between the purchaser and the acquired, such as continuity of management, personnel and business operations.[50] Fourth, the court evaluated the extent to which the purchaser assumed the liabilities necessary for the operation of the business.[51] The *Shannon* court's holding established that a buyer who receives the benefits of the acquired must also assume the costs attendant to the acquired.[52]

While a de facto merger typically involves a transfer of stock, at least one court, in *Diaz v. South Bend Lathe, Inc.*,[53] has applied the de facto merger exception in a situation where no stock was transferred. In *Diaz*, while no shares of stock were exchanged, the court ruled the transaction to be a de facto merger based upon the dissolution of the predecessor, the assumption of liabilities by the successor, and continuity of personnel, management and physical plant between the predecessor and the successor.[54] It should be

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43. *See* Knapp v. North Am. Rockwell Corp., 506 F.2d 361 (3d Cir. 1974).

44. *See* Western Resources Life Ins. Co. v. Gerhardt, 553 S.W.2d 783 (Tex. Civ. App. 1977, writ ref'd n.r.e.).

45. *Shannon*, 379 F. Supp. at 798-99.

46. *Id.* at 799.

47. *Id.* at 801 (citing McKee v. Harris-Seybold Co., 264 A.2d 98 (N.J. Super. Ct. Law Div. 1970)).

48. *Id.* at 799.

49. *Shannon*, 379 F. Supp. at 800.

50. *Id.* at 797.

51. *Id.* at 800.

52. *Id.* at 802.

53. 707 F. Supp. 97 (E.D.N.Y. 1989).

54. *Diaz*, 707 F. Supp. at 101-02.

noted, however, that typically when a court finds a successor in a context not involving the transfer of stock, the court applies the continuity of enterprise exception rather than the de facto merger exception.[55]

3. *Mere Continuation*

Courts recognize another exception to the rule of non-liability in instances where the buyer is merely a continuation of the seller. This exception, articulated in *Cyr v. B. Offen & Co.*,[56] focuses on whether there is a continuity of ownership or corporate structure between the buyer and seller. One court has described the appropriate test to determine whether this exception is applicable by stating that "[t]he test is not the continuation of the business operation, but rather the continuation of the corporate entity."[57]

Under the mere continuation exception, the "identity of the officers, directors and stockholders" remain the same and only one corporate entity survives.[58] In other words, "[f]or liability to attach, the purchasing corporation must represent merely a 'new hat' for the seller."[59] In *Cyr*, a group of key personnel bought the proprietorship from the sole owner who had died and continued the same business in the same name.[60] The court found the successor merely donned a "new hat" and, thus, held the successor liable.[61]

A court's application of either the de facto merger doctrine or the mere continuation exception yields nearly identical results; however, the reasoning behind these exceptions is radically different. In applying the de facto merger doctrine, the *Shannon* court based its decision on principles of corporate law to find successor liability.[62] In contrast, *Cyr* relied upon reference to the traditional four tort law justifications — to wit — (1) the manufacturer is better able to bear the costs than the consumer; (2) the manufacturer placed the product in commerce; (3) the

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55. *See* National Gypsum Co. v. Continental Brands Corp., 895 F. Supp. 328, 341 n.17 (D. Mass. 1995) (stating "that *Diaz* relies entirely on the 'continuity of enterprise' type of reasoning" and not the de facto merger doctrine).

56. 501 F.2d 1145 (1st Cir. 1974).

57. Elmer v. Tenneco Resins, 698 F. Supp. 535, 542 (D. Del. 1988).

58. Leannais v. Cincinnati, Inc., 565 F.2d 437 (7th Cir. 1977).

59. McKee v. Harris-Seybold Co., 264 A.2d 98, 106 (N.J. Super. Ct. Law Div. 1970), *aff'd*, 288 A.2d 585 (N.J. Super. Ct. App. Div. 1972).

60. *Cyr*, 501 F.2d. at 1151.

61. *Id.*

62. Shannon v. Samuel Langston Co., 379 F. Supp. 797 (W.D. Mich. 1974).

manufacturer impliedly warranted the product's safety by placing the same in commerce; and (4) the manufacturer is best suited to improving the product's quality.[63]

4. Fraudulent Conveyance

The fourth and final traditional exception to the non-liability rule of buyers is where a transaction is entered into to evade liability. Corporations cannot avoid liability through a fraudulent conveyance, such that a successor to a fraudulent conveyance will be liable in tort for the conduct of its predecessor.[64] This exception is consistent with the general rule against fraudulent conveyances and will be applied when the transfer is intended to avoid future liability[65] or prior judgments entered against a predecessor.[66] Inadequate consideration will likewise come within the ambit of this exception.[67]

5. Continuation of Enterprise

In *Turner v. Bituminous Casualty Co.*,[68] the court expanded both the de facto merger and the mere continuation exception, by eliminating the continuity of ownership requirement.[69] In *Turner*, a power press manufactured by a corporation known as "Old Sheridan" injured the plaintiff.[70] Prior to the injury but after the sale of the press, "Harris" bought Old Sheridan for cash and established "New Sheridan" as a subsidiary of Harris, into which went Old Sheridan.[71] Shortly following the sale, Old Sheridan was dissolved and New Sheridan continued as a wholly owned subsidiary of Harris.[72] Several years after this transaction, New

63. *Cyr*, 501 F.2d at 1154.

64. *See* Wolff v. Shreveport Gas, Elec. Light & Power Co., 70 So. 2d 789 (La. 1916). *But see* Kloberdanz v. Joy Mfg. Co., 288 F. Supp. 817 (D. Colo. 1968) (holding that a disclaimer of tort liability in an asset purchase does not constitute a fraudulent conveyance where no other remedy is available to the plaintiff).

65. *See* Raytech Corp. v. White, 54 F.3d 187 (3d Cir. 1995).

66. *See* Schmoll v. Acands, Inc., 703 F. Supp. 868 (D. Or. 1988), *aff'd*, 977 F.2d 499 (9th Cir. 1992). *See also* Locafrance United States Corp. v. Interstate Distribution Servs., Inc., 451 N.E.2d 1222 (Ohio 1983).

67. *See* Sullivan v. A.W. Flint Co., No. CV 920339263, 1996 WL 469716 (Conn. Super. Ct. 1996).

68. 244 N.W.2d 873 (Mich. 1976).

69. *Turner*, 244 N.W.2d at 883.

70. *Id.* at 875.

71. *Id.* at 875-76.

72. *Id.* at 876.

Sheridan merged into and became a division of Harris.[73] The trial court granted the defendant's motion for summary judgment, holding that because neither Harris nor New Sheridan had manufactured the press, neither was liable.[74] The Supreme Court of Michigan reversed, citing to *Shannon* and *Cyr*.[75] Although *Turner* did not involve a transfer of stock as *Shannon* did,[76] the court found that the other necessary factors were present.[77] The court observed that the number of acquired shareholders' shares in the successor may be so minimal that commonality is small, but present nevertheless.[78] In addition, it noted that in the absence of the original manufacturer, a plaintiff may be left without a remedy.[79]

Turner relied upon *Cyr* as its justification for imposing liability,[80] finding the successor to be the best cost-bearer and the entity capable of improving the product.[81] Accordingly, despite the absence of the other two factors, i.e. the successor did not place the product into commerce nor make any representations with respect to the safety of the product, the *Turner* court found the successor liable.[82] The court's decision expanded the traditional corporate rule rather than employing a new theory based upon tort principles. The court remarked "[c]ontinuity is the purpose, continuity is the watchword, continuity is the fact."[83]

The continuity of enterprise exception has been embraced in Alabama,[84] and impliedly adopted in Michigan,[85] New Jersey,[86] Ohio[87] and Pennsylvania.[88] One federal court interpreting Mississippi law has also recognized the continuity of enterprise

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73. *Id.*
74. *Turner*, 244 N.W.2d at 876.
75. *Id.* at 881, 884.
76. *Id.* at 876.
77. *Id.* at 883-84.
78. *Id.* at 880.
79. *Turner*, 244 N.W.2d at 878.
80. *Id.* at 881.
81. *Id.*
82. *Id.* at 884.
83. *Id.* at 882.
84. *See* Andrews v. John E. Smith's Sons Co., 369 So. 2d 781 (Ala. 1979).
85. *See* Foster v. Cone-Blanchard Mach. Co., 560 N.W.2d 664 (Mich. Ct. App. 1997) *rev'd* 597 N.W.2d 506 (Mich. 1999) (finding that the availability of other recourse against the predecessor rendered the continuity of enterprise exception inapplicable).
86. *See* Woodrick v. Jack J. Burke Real Estate, 703 A.2d 306 (N.J. Super. Ct. App. Div. 1997).
87. *See* McGaw v. South Bend Lathe, Inc., 598 N.E.2d 18 (Ohio Ct. App. 1991)
88. *See* Dawejko v. Jorgensen Steel Co., 434 A.2d 106 (Pa. Super. 1981).

exception.[89] However, the number of states rejecting the exception dwarfs the number adopting the same.[90]

6. Product Line Exception

In *Ray v. Alad*,[91] the Supreme Court of California discarded corporate law principles and embraced a strict liability approach to corporate successor liability.[92] Pursuant to *Alad*, irrespective of the transaction's terms, a successor is liable if it continues the predecessor's product line.[93] In *Alad*, the successor purchased the assets of the target corporation for cash.[94] Included among the assets were inventory, the plant, equipment, designs, and the goodwill of the predecessor.[95] The successor continued to sell and market the identical product under the same name and with the same personnel as the predecessor.[96] Initially, the court determined that under these facts, neither the de facto merger exception nor the mere continuation exception was applicable.[97] Although the court noted that a finding of non-liability as to the successor would promote capital availability, the court held that the importance of providing a remedy for the injured party outweighed the benefit of transferability of capital.[98]

Alad found three justifications for imposing liability based on the product line exception. First, the elimination of the predecessor

89. *See* Mozingo v. Correct Mfg. Corp., 752 F.2d 168 (5th Cir. 1985).

90. *See* Conn v. Fales Div. of Mathewson Corp., 835 F.2d 145 (6th Cir. 1987) (applying Kentucky law); Travis v. Harris Corp., 565 F.2d 443 (7th Cir. 1977) (applying Indiana and Ohio law); Swayze v. A.O. Smith Corp., 694 F. Supp. 619 (E.D. Ark. 1988) (applying Arkansas law); Elmer v. Tenneco Resins, Inc., 698 F. Supp. 535 (D. Del. 1988); Johnston v. Amsted Indus., Inc., 830 P.2d 1141 (Colo. Ct. App. 1992); Pancratz v. Monsanto Co., 547 N.W.2d 198 (Iowa 1996); Green v. Firestone Tire & Rubber Co., 460 N.E.2d 895 (Ill. App. Ct. 1984); Nissen Corp. v. Miller, 594 A.2d 564 (Md. 1991); Niccum v. Hydra Tool Corp., 438 N.W.2d 96 (Minn. 1989); Chemical Design, Inc. v. American Standard, Inc., 847 S.W.2d 488 (Mo. Ct. App. 1993); Jones v. Johnson Mach. & Press Co., 320 N.W.2d 481 (Neb. 1982); Schumacher v. Richards Shear Co., Inc., 451 N.Y.S.2d 195 (N.Y. 1983); Downtowner, Inc. v. Acrometal Prods., Inc., 347 N.W.2d 118 (N.D. 1984); Hamaker v. Kenwel-Jackson Mach., Inc., 387 N.W.2d 515 (S.D. 1986); Harris v. T.I., Inc., 413 S.E.2d 605 (Va. 1992); and Fish v. Amsted Indus., Inc., 376 N.W.2d 820 (Wis. 1985).

91. 560 P.2d 3 (Cal. 1977).

92. *Alad*, 560 P.2d at 11.

93. *Id.*

94. *Id.* at 5.

95. *Id.* However, the transaction excluded the predecessor's cash, insurance, receivables and prepaid expenses. *Id.*

96. *Id.*

97. *Alad*, 560 P.2d at 5.

98. *Id.*

effectively removed the plaintiff's remedy against said predecessor[99] because it would be impractical to recover damages from former shareholders and the predecessor's insurance would not cover post-transaction injuries.[100] Second, the successor was capable of obtaining insurance to cover itself in regard to future tort claims.[101] Third, the successor as recipient of the predecessor's goodwill must also assume any "bad will" of the predecessor.[102]

Not many jurisdictions have embraced the product line exception. To date, aside from California, only New Jersey,[103] New Mexico,[104] Pennsylvania,[105] and Washington[106] have done so.[107] New York courts are split on the issue.[108] However, jurisdictions that have adopted *Alad* have interpreted the exception broadly. For example, in *Nieves v. Bruno Sherman Corp.*,[109] the New Jersey Supreme Court ruled that the product line exception encompasses not only the current successor but, rather, all viable intermediate successors.[110] The *Nieves* court ruled that *Alad* "was concerned not as much with the availability of one particular viable successor as it was with the unavailability of the original manufacturer by reason of its divestiture of assets and dissolution."[111]

Similarly, in *Rawlings v. D.M. Oliver, Inc.*,[112] the court held a

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99. *Id.* at 9.

100. *Id.* at 10.

101. *Id.*

102. *Alad*, 560 P.2d at 10.

103. *See* Ramirez v. Amsted Indus., 431 A.2d 811 (N.J. 1981).

104. *See* Garcia v. Coe Mfg. Co., 933 P.2d 243 (N.M. 1997).

105. Hill v. Trailmobile, 603 A.2d 602, 606 (Pa. Super. 1992) ("[Pennsylvania is] one of the few states to adopt the product-line exception to successor liability.")

106. Hall v. Armstrong, 692 P.2d 787, 791 (Wash. 1984).

107. In addition, trial courts in Connecticut have applied the product line exception. *See* Pastorrek App. Div. v. Lyn-Lad Truck Racks, Inc., No. CV 9605624268, 1999 WL 608674 (Conn. Super. 1999).

108. *See* Hart v. Bruno Machinery Corp., 679 N.Y.S.2d 740 (3rd Dep't. App. Div. 1998) (adopting the product line theory). *But see* City of New York v. Charles Pfizer & Co., 688 N.Y.S.2d 23 (1st Dep't. App. Div. 1999) ("[W]e would decline to adopt the 'product line' approach as a radical change from existing law . . . ."). In Rothstein v. Tennessee Gas Pipeline Co., No. 98-04929, 1999 WL 968186 (2d Dep't. App. Div. 1999), the court did not reach the issue but noted the split in authority. New York's highest court has not definitively ruled on the issue. *See* Schumacher v. Richard Shear Co., 451 N.Y.S.2d 195 (N.Y. 1983) (adopting neither the product line nor the continuity of enterprise exception, but noting both were inapplicable to facts of the case). *See also* Howard v. Clifton Hydraulic Press Co., 830 F. Supp. 708 (E.D.N.Y. 1993) (applying New York law and declining to adopt either the product line or continuity of enterprise exception).

109. 431 A.2d 826 (N.J. 1981).

110. *Nieves*, 431 A.2d at 831.

111. *Id.*

112. 159 Cal. Rptr. 119 (Cal. Ct. App. 1979).

successor liable notwithstanding the fact that the successor never manufactured the product but merely continued the predecessor's business.[113] The *Rawlings* court found that the successor enjoyed the goodwill of the predecessor as to the remaining products of the business.[114]

Numerous jurisdictions have considered and rejected the product line approach. These jurisdictions question the policy objectives listed in *Alad* and seek to retain the traditional rule of non-liability.[115]

While the product line exception has not been widely adopted in the years following its first articulation, New Jersey stands out as having expanded this exception and holds successors liable even when they did not continue to manufacture the product.[116] New Jersey has also extended liability under the product line exception to intermediate successors[117] as well purchasers in bankruptcy proceedings.[118]

In California, courts have limited *Rawlings* and have applied the product line exception only in the context of strict liability.[119] Another California court limited *Rawlings* to situations in which the successor could allocate the risk, allocate the financial burden to the actual responsible party, and spread out the cost of injury.[120]

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113. *Rawlings*, 159 Cal. Rptr. at 121-22.

114. *Id.* at 124-25.

115. *See* Johnson v. Amsted Indus., Inc., 830 P.2d 1141 (Colo. Ct. App. 1992); Bernard v. Kee Mfg. Co., 409 So. 2d 1047 (Fla. 1982); Bullington v. Union Tool Corp., 328 S.E.2d 726 (Ga. 1985); Hernandez v. Johnson Press Corp., 388 N.E.2d 778 (Ill. App. Ct. 1979); DeLapp v. Xtraman, Inc., 417 N.W.2d 219 (Iowa 1987); Stratton v. Garvey Int'l, Inc., 676 P.2d 1290 (Kan. Ct. App. 1984); Guzman v. MRM/Elgin, 567 N.E.2d 929 (Mass. 1991); Pelc v. Bendix Mach. Tool Corp.,, 314 N.W. 614 (Mich. Ct. App. 1981); Niccum v. Hydra-Tool Corp., 438 N.W.2d 96 (Minn. 1989); Young v. Fulton Iron Works Co., 709 S.W.2d 927 (Mo. Ct. App. 1986); Jones v. Johnson Mach. and Press Co., 320 N.W.2d 481 (Neb. 1982); Simoneau v. South Bend Lathe, Inc., 543 A.2d 407 (N.H. 1988); Downtown, Inc. v. Acrometal Prods., Inc., 347 N.W.2d 118 (N.D. 1984); Flaugher v. Cone Automatic Mach. Co., 507 N.E.2d 331 (Ohio 1987); Goucher v. Parmac, Inc., 694 P.2d 953 (Okla. Ct. App. 1984); Hamaker v. Kenwel-Jackson Mach. Inc., 387 N.W.2d 515 (S.D. 1986); Griggs v. Capital Mach. Work, Inc., 690 S.W.2d 287 (Tex. Civ. App. 1985, writ ref'd n.r.e.); Ostrowski v. Hydra-Tool Corp., 479 A.2d 126 (Vt. 1984); Harris v. T.I. Inc., 413 S.E.2d 605 (Va. 1992); Fish v. Amsted Indus., Inc., 376 N.W.2d 820 (Wis. 1985).

116. *See* Pacius v. Thermtroll Corp., 611 A.2d 153 (N.J. Super. Ct. Law Div. 1992).

117. *See* Nieves v. Bruno Sherman Corp., 431 A.2d 826 (N.J. 1981). *See also* Trimper v. Harris Corp., 441 F. Supp. 346 (E.D. Mich. 1977) (holding an intermediate successor may be liable under the continuity of enterprise exception).

118. *See* Wilkerson v. C.O. Porter Mach. Co., 567 A.2d 598 (N.J. Super. Ct. Law Div. 1989) (allowing plaintiff to invoke the product line exception against a successor that bought the original manufacturer's assets in a bankruptcy sale).

119. *See* Maloney v. American Pharm. Co., 255 Cal. Rptr. 1 (Cal. Ct. App. 1988).

120. *See* Lundell v. Sidney Mach. Tool Co., 236 Cal. Rptr. 70 (Cal. Ct. App. 1987).

7. *Duty to Warn*

A number of jurisdictions have imposed successor liability based upon the duty to warn, i.e. the successor's failure to warn the predecessor's customers of product defects discovered or defects that should have been discovered by the successor.[121] However, courts have also held that succession alone does not impose such liability; rather there must be an established relationship between the successor and the customers of the predecessor, such as the assumption of service contracts, the successor's continued servicing of the product, or the successor's knowledge of the product's location.[122]

II. PUNITIVE DAMAGES

The next part of this article deals with the history and purposes of punitive damages, which is relevant to understanding why the imposition of punitive damages on a successor corporation may, depending on the circumstances, be improper.

A. *History of Punitive Damages*

Punitive damage awards permeate our civil courts.[123] While in recent years the proliferation of punitive damage awards in products liability cases has markedly increased,[124] punitive damages are certainly not new.[125] Indeed, the concept of punitive damages is firmly embedded in our tort system, having been recognized by

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121. *See, e.g.*, Gee v. Tenneco, Inc., 615 F.2d 857 (9th Cir. 1980).

122. *See* LaFountain v. Webb Indus. Corp., 951 F.2d 544 (3d Cir. 1991); Florom v. Elliott Mfg., 867 F.2d 570 (10th Cir. 1989).

123. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 7-15 (5th ed. 1984).

124. *See* Pacific Mut. Life Ins Co. v. Haslip, 499 U.S. 1, 61 (1991) (O'Connor, J., dissenting) ("Recent years . . . have witnessed an explosion in the frequency and size of punitive damages awards."); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 282 (1989) (O'Connor, J., and Stevens, J., concurring in part and dissenting in part) ("Awards of punitive damages are skyrocketing. As recently as a decade ago, the largest award of punitive damages affirmed by an appellate court in a products liability case was $250,000. Since then, awards more than 30 times as high have been sustained on appeal."). In response to the volume of punitive damage claims, particularly in mass tort litigation, some courts have entered orders deferring such claims. The sheer volume of punitive damages cases in mass tort litigation has resulted in some courts deferring the issue indefinitely. *See, e.g.*, Amended Case Management Order of Justice Helen E. Freedman dated Sept. 20, 1996, § 17 in the New York City Asbestos Litigation ("[P]unitive damages are deferred until such time as the Court deems otherwise, upon notice and a hearing.").

125. *See* Day v. Woodworth, 54 U.S. 363, 371 (1851) (acknowledging the historical propriety of punitive damages).

English common law nearly 250 years ago.[126] Thus, punitive damages have been around for a very long time.[127] Opposition to such damages has been long running as well.[128] While compensatory damages are awarded to compensate and restore plaintiffs to their prior condition,[129] punitive damages are "awarded against a [manufacturer] to punish [it] for outrageous conduct and to deter [it] and others like [it] from similar conduct in the future."[130]

B. Purposes of Punitive Damages: Punishment and Deterrence

Quasi-criminal in nature, punitive damages are sanctions imposed primarily to punish[131] past wrongful conduct and also to deter similar conduct by the defendant or other parties.[132] There are a handful of jurisdictions adding compensation[133] and other goals[134] to

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126. *See* Wilkes v. Wood, 98 Eng. Rep. 489, 498-99 (K.B. 1763) (stating that punitive damages "are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself."). *See also Browning-Ferris Indus.*, 492 U.S. at 274 (discussing punitive damages under English common law); W. PAGE KEETON ET AL., *supra* note 123, at 7-15.

127. David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1263 (1976) (citing Huckle v. Money, 2 Wils. 205, 207 (K.B. 1763) and Wilkes v. Wood, 98 Eng. Rep. 489 (K.B. 1763)).

128. *See* Fay v. Parker, 53 N.H. 342, 382 (1872) ("The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of law.").

129. *See* RESTATEMENT (SECOND) OF TORTS § 903 (1977).

130. *Id.* § 908(1). *See also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (noting that punitive damages "are not compensation for injury but private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence").

131. *See Haslip*, 499 U.S. at 19 (observing that most states impose punitive damages "for purposes of retribution and deterrence"); Allen R & H Oil & Gas Co., 63 F.3d 1326, 1332-33 (5th Cir. 1995) (noting that punitive damages punish wrongdoers for their intentional or malicious acts and are used to deter similar future conduct); Acosta v. Honda Motor Co., 717 F.2d 828, 836-37 (3d Cir. 1983) (stating that punitive damages serve the twin goals of punishment and deterrence).

132. *See Haslip*, 499 U.S. at 54 (O'Connor, J., dissenting) (describing punitive damages as "quasi-criminal punishment"); *Browning-Ferris Indus.*, 492 U.S. at 275 ("[P]unitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law . . ."); Smith v. Wade, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) (explaining that punitive damage awards are "quasi-criminal"); RESTATEMENT, *supra* note 129, § 908.

133. *See* Collens v. New Canaan Water Co., 234 A.2d 825 (Conn. 1967); Joba Const. Co., Inc. v. Burns & Roe, Inc., 329 N.W.2d 760 (Mich. Ct. App. 1982); Hofer v. Lavander, 679 S.W.2d 479 (Tex. 1984).

134. David G. Owen, *A Punitive Damage Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 374 (1994) (articulating five functions of punitive damage awards: "(1) education, (2) retribution, (3) deterrence, (4) compensation and (5) law enforcement").

the purposes of punitive damages. Punitive damages are, thus, not truly awards but actually constitute fines and penalties.[135] It has also been recognized that an aggrieved party derives satisfaction from seeing the defendant ordered to pay punitive damages and that this discourages resort to revengeful actions.[136] Such damages also serve to publicly avenge a wrong from a moral perspective.[137] The predicate conduct for such damages is the egregious behavior of the defendant[138] and, accordingly, punitive damages are not assessed vicariously.[139] Rather, the punishment is intended for the individual wrongdoer.[140]

The other main objective cited to support the rationale of punitive damages is the deterrence of similar wrongful conduct by the defendant and others in the future.[141] The financial pain of paying an award of punitive damages strengthens the law's admonition to refrain from such conduct.[142]

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135. *See Haslip*, 499 U.S. at 19 (stating that punitive damages serve the identical purpose as criminal punishment). *See also* RESTATEMENT, *supra* note 129, § 908(1) cmt. a (remarking that the purpose of punitive damages is same as purpose of criminal fines).

136. *See* Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 520-22 (1957).

137. *See id.*; JAMES D. GHIARDI & JOHN J. KIRCHER, PUNITIVE DAMAGES: LAW & PRACTICE § 5.01 (1984). Interestingly, the late United States Supreme Court Justice Thurgood Marshall stated that punishment motivated by revenge has no place in a civilized society. *See* Furman v. Georgia, 408 U.S. 238, 343 (1972) (Marshall, J., concurring).

138. GHIARDI & KIRCHER, *supra* note 137. The level of conduct differs among the states. *See, e.g.*, CAL. CIV. CODE § 3288 (Deering 1996) (requiring "oppression, fraud, or malice", express or implied, for breach of noncontractual obligation); FLA. STAT. ANN. § 768.73(1)(a) (West Supp. 1990) (requiring "willful, wanton or gross misconduct").

139. GHIARDI & KIRCHER, *supra* note 137 § 24.02. However, a corporate entity may be vicariously liable for misconduct of employees based on an agency relationship. KEETON ET AL., *supra* note 123, at 7. Some jurisdictions have adopted the complicity rule requiring that the employer ordered, participated or ratified the misconduct prior to the imposition of punitive damages upon the employer for the misconduct. *See* Clarence Morris, *Punitive Damages in Personal Injury Cases*, 21 OHIO ST. L.J. 216, 221 (1960).

140. Rental & Management Associates, Inc. v. Hartford Ins. Co., 588 N.Y.S.2d 982 (N.Y. Sup. 1992), *aff'd* 614 N.Y.S.2d 513 (1st Dep't. App. Div. 1994).

141. *See*, e.g., OWEN, *supra* note 134, at 1279; Owens-Corning Fiberglas Corp., v. Garrett, 682 A.2d 1143, 1161 (Md. 1996) ("The purpose of punitive damages is not only to punish the defendant for egregiously bad conduct toward the plaintiff, but also to deter the defendant and others contemplating similar behavior.").

142. *See* Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1184 (1931). Furthermore, punitive damages are not insurable in most states. GHIARDI & KIRCHER, *supra* note 137, § 7.13.

C. *Level of Misconduct Justifying A Punitive Award*

The level of misconduct the defendant must have engaged in as a prerequisite to warranting punitives varies[143] but, in general, must be in some respect outrageous.[144] The conduct must involve "some element of outrage similar to that usually found in crime."[145] Ordinary negligence does not justify an award of punitives[146] but, rather, the conduct must be motivated by evil.[147] Thus, an assessment of punitives is linked to a determination that the defendant's conduct was outrageous.[148] In addition, some states have enacted tort reform statutes that codify the specific conduct warranting punitive damages.[149]

D. *Burden of Proof*

The purpose of tort law is restitutionary and, therefore, the preponderance of the evidence standard is used for assessing compensatory damages.[150] In contrast, punitive damages are quasi-criminal in nature.[151] Accordingly, the level of proof is usually more stringent; to wit, the "clear and convincing" evidence standard.[152] This standard calls for "that measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be

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143. Cantrell v. GAF Corp., 999 F.2d 1007 (6th Cir. 1993) (applying Ohio law) (stating that punitives would be imposed only if manufacturer flagrantly indifferent to probability that conduct would cause substantial harm); Owens-Illinois, Inc. v. Zenobia, 601 A.2d 633 (Md. 1992) (requiring actual malice to assess punitives); Herman v. Sunshine Chemical Specialties, 608 A.2d 978 (N.J. Super. 1992) (requiring outrageous misconduct demonstrating reckless disregard for others); Lugo, by Lopez v. LJN Toys, Ltd., 539 N.Y.S.2d 922, 925 (1st Dep't. App. Div. 1989), *aff'd* 552 N.E.2d 162 (N.Y. 1990) (requiring evil motive or willful and intentional conduct).

144. GHIARDI & KIRCHER, *supra* note 137, § 5.01-.03. Otherwise, punitives could be assessed in any case wherein the compensatory damages were considered insufficient to deter future conduct.

145. RESTATEMENT, *supra* note 129, § 908 cmt. b.

146. *Id.*

147. *Rental & Management Assocs., Inc.*, 588 N.Y.S.2d at 982.

148. *Id.* at 983.

149. Alabama's statute allows punitive damages where the defendant engaged in "oppression, fraud, wantonness, or malice . . . . " ALA. CODE § 6-11-20(a) (1993 & Supp. 1996). Florida permits punitive damages for "willful, wanton or gross misconduct." FLA. STAT. ANN. § 768.73(1)(a) (West 1994 & Supp. 1995). Illinois permits punitive damages when the "defendant's conduct was with an evil motive or with reckless and outrageous indifference to a highly unreasonable risk of harm and with a conscious indifference to the rights and safety of others." 735 ILL. COMP. STAT. ANN. 5/2-1115.05(b) (West 1993).

150. GHIARDI & KIRCHER, *supra* note 143, § 9.12.

151. *See* RESTATEMENT, *supra* note 129, § 908 cmt. b.

152. GHIARDI & KIRCHER, *supra* note 143, § 9.12.

established."[153] Of course various jurisdictions have different burdens.[154]

III. Successor Liability for Punitive Damages

Many states have allowed the imposition of punitive damages against successor corporations in products liability cases.[155] The cases in which punitive damages were imposed upon successor corporations have usually arisen in the context of asbestos personal injury cases involving Celotex.[156] The combination of the similarity in facts and the nationwide scope of these asbestos decisions[157] has enabled commentators to cite to the Celotex asbestos cases in discussing this issue.[158] The relevant facts are as follows.[159] Philip Carey Manufacturing Company ("Old Carey"), an asbestos product manufacturer, began operations in 1888. In 1967, Old Carey merged into Glen Alden, which immediately transferred Old Carey into a wholly owned subsidiary, Philip Carey Manufacturing Company ("New Carey"). In 1970, New Carey merged into Briggs Manufacturing Company, renaming itself Panacon Corporation. Panacon continued the asbestos business through its Philip Carey division. In 1972, a wholly owned subsidiary of Jim Walter Corporation, Celotex, acquired Panacon from Glen Alden for cash and merged Panacon into Celotex. Celotex continued to operate the asbestos division through a Philip Carey division until 1973. Celotex distributed asbestos products

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153. *See* H.R. 956, 104th Cong. § 101(4) (1986); Camillo v. Geer, 587 N.Y.S.2d 306 (App. Div. 1992); Vogt v. Emerson Electric Co., 805 F. Supp. 506 (M.D. Tenn. 1992).

154. *Compare* Freeman v. Alamo Management Co., 607 A.2d 370 (Conn. 1992) (preponderance of the evidence) *with* Camillo v. Geer, 587 N.Y.S.2d 306 (App. Div. 1992) (clear and convincing evidence) *and* Vogt v. Emerson Electric Co., 805 F. Supp. 506 (M.D. Tenn. 1992) (clear and convincing evidence).

155. *See* Richard D. Schuster, Comment, *Punitive Damages Awards in Strict Liability Litigation: The Doctrine, The Debate, The Defenses*, 42 Ohio St. L.J. 771, 793 (1981).

156. Celotex litigated this issue in the 1980s. *See* In re Related Asbestos Cases, 566 F. Supp. 818 (N.D. Cal. 1983); Celotex Corp. v. Pickett, 490 So. 2d 35 (Fla. 1986); Brotherton v. Celotex Corp., 493 A.2d 1337 (N.J. Super. Ct. Law Div. 1985).

157. Celotex raised the issue either through a motion in limine or a summary judgment motion. *See* In re Related Asbestos Cases, 566 F. Supp. 818 (N.D. Cal. 1983); Celotex Corp. v. Pickett, 490 So. 2d 35 (Fla. 1986); Brotherton v. Celotex Corp., 493 A.2d 1337 (N.J. Super. 1985).

158. *See, e.g.*, Deborah E. Bielicke, Note, *Successor Liability for Punitive Damages: Breaking The Corporate Rule*, Wash. U. L. Q., 339, 359 (1990); Levenstam and Lynch, *supra* note 1, at 30.

159. The facts are based on the many cases involving Celotex. *See, e.g.*, In re Related Asbestos Cases, 566 F. Supp. 818 (N.D. Cal. 1983); Martin v. Johns-Manville Corp., 494 A.2d 1088 (Pa. 1985); Brotherton v. Celotex Corp., 493 A.2d 1337 (N.J. Super. Ct. Law Div. 1985).

with warning labels but retained some of Panacon's employees. Celotex was sued as a defendant in tens of thousands of asbestos personal injury cases alleging exposure to the products of Philip Carey.

A. The Formalistic Approach

In a statutory merger, one corporation is absorbed by another and the latter becomes the successor.[160] State statutes impose successor liability on the surviving corporation.[161] Generally, courts have imposed compensatory liability upon corporate successors under the theory that the surviving entity of a merger is responsible for the debts and obligations of its predecessor since the merger "merely directs the blood of the old corporation into the veins of the new."[162] Automatic compensatory liability is a fundamental principle of corporate law and compensatory liability is statutorily imposed.[163] Courts have adopted this principle to likewise impose automatic punitive liability upon successor corporations, reasoning that such liability follows the wrongdoer.[164]

An application of the formalistic approach to successor liability for punitive damages wherein the form of the transaction governs is *Celotex Corp. v. Pickett.*[165] In *Pickett,* the court found that the statutory merger served as the conduit for imposing both compensatory and punitive damages upon the successor.[166] The *Pickett* court held that a successor may be responsible for exemplary damages when it is the culmination of a statutory merger.[167] Under the reasoning set forth in *Pickett,* the court found no rationale for considering punitive damages in a manner different from any other contingent liability.[168] The court further held that finding the successor liable for punitive damages advanced the two primary goals of punitive damages-punishment and deterrence.[169] The court observed that its decision punishes the "present [legal]

160. 15 FLETCHER CYC. CORP. § 7041.

161. Note that varying the terms of the transaction can avoid this fate. A purchaser of assets may use both cash and stock.

162. Moe v. Transamerica Title Ins. Co., 98 Cal. Rptr. 547, 556-57 (1971).

163. 15 FLETCHER CYC. CORP. § 7121.

164. 15 FLETCHER CYC. CORP. § 7123.10, n.6.

165. 490 So. 2d 35 (Fla. 1986).

166. *Pickett,* 490 So. 2d at 38.

167. *Id. Accord* Duca v. Raymark Indus., No. 84-0587, slip op. at 4 (E.D.Pa. Nov. 7, 1986); Krull v. Celotex Corp., 611 F. Supp. 146, 148-49 (N.D. Ill. 1985).

168. *Pickett,* 490 So. 2d at 37-38.

169. *Id.* at 38.

embodiment" of the entity whose conduct gave rise to the damage.[170]

B. The Non-Formalistic Approach

An example of a case that looked beyond the form of the transaction in determining the propriety of imposing punitive damages on a successor is *Brotherthon v. Celotex Corp.*[171] In *Brotherton*, the court found a statutory merger to be merely one of the prerequisites for holding a successor liable for punitive damages.[172] A second step must then be fulfilled, i.e. either the continuity of enterprise or the product line exception must be satisfied before punitive damages are imposed upon the successor.[173]

Most courts adopting the two-step approach[174] have rejected the product line theory in favor of the continuity of enterprise exception to evaluate the propriety of imposing punitive damages on a successor.[175] According to *Brotherton*,

> [t]he product line theory is designed to liberalize recovery for plaintiffs left remediless against a defunct corporation. This aim is consistent with the rationale behind compensatory damages, which is to reimburse individuals for losses sustained . . . . The continuation test fulfills a different function. This test allows punitive damages to be assessed against a successor where it shares certain similarities with its predecessor. By creating an identity requirement, the continuation test furthers the primary objectives of punitive damages, i.e., punishment of the wrongdoer and deterrence of similar conduct in the future.[176]

While *Brotherton* recognized the de jure character of the Celotex merger for purposes of compensatory liability, with respect to punitive liability, the *Brotherton* court analyzed the issue beyond

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170. *Id.*

171. 493 A.2d 1337 (N.J. Super. Ct. Law Div. 1985).

172. *Brotherton*, 493 A.2d at 1340.

173. *Id.* at 1342-43.

174. Many courts reject the two step approach and find punitive damages justified based solely on a statutory merger. *See, e.g.*, Celotex v. Pickett, 490 So. 2d 35, 38 (Fla. 1986); Marks v. Minnesota Mining & Mfg., 232 Cal. Rptr. 594 (1986); Hanlon v. Johns-Manville Sales Corp., 599 F. Supp. 376, 378 (N.D. Iowa 1984).

175. *See, e.g., Brotherton.*, 493 A.2d at 1341; In re Related Asbestos Cases, 566 F. Supp. 818 (N.D. Cal. 1983).

176. *See Brotherton*, 493 A.2d at 1342.

the form of the transaction, employing a "degree of identity" test. In *In re Related Asbestos Cases*, the court did not accept the de jure nature of the Celotex merger and characterized the transaction as if Celotex had acquired its predecessor by a purchase of assets.[177] As the court characterized the transaction as an asset purchase, only the product line exception as articulated in *Ray v. Alad* would justify the imposition of punitive liability upon the successor. As a result, in *In re Related Asbestos Cases*,[178] the court held that "the justifications underlying successor liability for compensatory damages articulated in *Ray v. Alad* simply are not present [w]hen punitive damages are sought."[179] The court added that imposing punitive damages upon the successor had the specter of creating a windfall to the plaintiff,[180] depriving future plaintiffs of compensatory damages,[181] and an inability to be covered financially and face financial ruin.[182]

In *Martin v. Johns-Manville*,[183] the court refused to impose punitive damages based upon the form of the transaction but rather looked at "the degree of identity" between the successor and the predecessor.[184] According to *Martin*, to impose punitives requires evidence of an "identity of the successor with its predecessor so as to justify the conclusion that those responsible for the reckless conduct of the predecessor will be punished and the successor will be deterred from similar conduct."[185]

In *Drayton v. Jiffee Chemical Corp.*,[186] the plaintiff sought punitive damages against the successor. The court found that punitive damages were unjustified because the successor had eliminated the predecessor's management upon merger and reconstituted the product.[187]

A criticism can be leveled at the courts that have relied upon the form of the transaction when one considers that punitive damages infringe on the criminal law.[188] The vast majority of jurisdictions

177. 566 F. Supp 818, 820 (N.D. Cal. 1983).

178. *In re Related Asbsetos Cases*, 566 F. Supp. at 818. *But see* Certain Underwriters of Lloyd's of London v. Pacific Southwest Airlines, 786 F. Supp. 867 (C.D. Cal. 1992).

179. *In re Related Asbestos Cases*, 566 F. Supp. at 822.

180. *Id.*

181. *Id.*

182. *Id.*

183. 469 A.2d 655 (Pa. Super. 1983), *rev'd on other grounds*, 494 A.2d 1088 (Pa. 1985).

184. *Martin*, 469 A.2d at 667.

185. *Id.* at 1105. The Pennsylvania Supreme Court did not address this issue on appeal.

186. 591 F.2d 352 (6th Cir. 1978).

187. *Drayton*, 591 F.2d at 366.

188. *See* Fay v. Parker, 53 N.H. 342, 382 (1873) ("How could the idea of punishment be

seek to punish and deter tortfeasors. Accordingly, the lynchpin of punitive damages is the personal fault of the entity. An innocent successor should not be forced to pay punitive damages, which really amount to a fine.

Under proper circumstances, levying punitive damages against a successor is justified. However, neither moral nor economic grounds exist for assessing punitive damages against an innocent successor. In effect, such damages punish a corporation vicariously for something that it did not do and which could have been avoided by resort to a different method of acquisition. When punitive damages are imposed upon an innocent successor, the punishment and deterrence goals of punitive damages are misdirected because the successor's shareholders are not the ones guilty of failing to monitor the entity whose misconduct is the basis of the punitive liability. If the perpetrators of the misconduct are not punished, how are the goals of punitive liability advanced?

Punitive damages are meant to punish egregious conduct[189] and take into account the societal cost of the injury not covered by compensatory damages.[190] Harming innocent entities does not advance the goals of punitives.[191] The two primary goals underpinning the rationale for punitive liability are punishment and deterrence of outrageous misconduct. Punishment is aimed at the wrongdoer. Deterrence is aimed at the misconduct, to deter the tortfeasor and others from engaging in similar misconduct. The punitive aspect is eviscerated if the wrongdoer is not punished. Similarly, with respect to deterrence, imposing punitive liability on an innocent successor corporation does not deter the wrongdoer from engaging in future like misconduct.

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deliberately and designedly installed as a doctrine of civil remedies?"). *But see* Comment, *Punitive Damages Awards in Strict Products Liability Litigation: The Doctrine, The Debate, The Defenses*, 42 OHIO ST. L.J. 771, 774-76 (1981) (noting punitive damages do not result in loss of liberty).

189. Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL L. REV. 133, 138 (1982).

190. Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL L. REV. 1, 6 (1982).

191. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (stating that punitive damages "are not compensation for injury . . . [but] are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence"); Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1333 (5th Cir. 1995) ("Punitive damages . . . are fundamentally collective; their purpose is to protect society by punishing and deterring wrongdoing.").

IV. Why Innocent Successors Should Not Be Subject To Punitives

A. Collecting Punitive Damages from the Estate of a Tortfeasor

An interesting comparison can be made between an attempt to collect punitive damages from innocent successors and attempting the same against the estate of a wrongdoer.[192] In the latter, the survivability of suit is typically controlled by statute. Since the twin principal aims of punitives are punishment and deterrence, if the tortfeasor is deceased, most courts have held that the goals are not advanced by allowing punitives to be collected from the estate of the decedent.[193] In contrast, a few courts have held that the goals of punitive damages are advanced as others may be deterred from similar conduct.[194]

It appears that only six jurisdictions allow punitive damages to be recoverable against a deceased tortfeasor's estate: Montana,[195] West Virginia,[196] Texas,[197] Alabama,[198] New Hampshire[199] and Pennsylvania.[200] In *Perry v. Melton*,[201] the court ruled that because, under West Virginia law, compensation is part of the goal of punitives, imposing the same on an estate is consistent with the goal of punitives.[202] The court also held that the imposition of punitives would serve to deter others from similar wrongful conduct.[203]

In *Hofer v. Lavender*,[204] the court also found that since

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192. The cases that follow deal only with claims for punitive damages as opposed to double or treble damages.

193. Sullivan v. Associated Billposters & Distributors, 6 F.2d 1000 (2d Cir. 1925); GAC Corp. v. Callahan, 681 F.2d 1295 (11th Cir. 1982); Holm v. Timber Indus., v. Plywood Corp. of America, 51 Cal. Rptr. 597 (1966); Lohr v. Byrd, 522 So. 2d 845 (Fla. 1988); Stafford v. Purified Down Products Corp., 801 F. Supp. 130 (N.D. Ill. 1992); Gordon v. Nathan, 352 N.Y.S.2d 464 (App. Div. 1974); Tarbrake v. Sharp, 894 F. Supp. 270 (E.D. Va. 1995).

194. Ellis v. Zuck, 546 F.2d 643 (5th Cir. 1977); Munson v. Raudonis, 387 A.2d 1174 (N.H. 1978).

195. Tillet v. Lippert, 909 P.2d 1158 (Mont. 1996).

196. Perry v. Melton, 299 S.E.2d 8 (W.Va. 1982).

197. Hofer v. Lavender, 679 S.W.2d 470 (Tex. 1984).

198. Ellis v. Zuck, 546 F.2d 643 (5th Cir. 1977) (predicting Alabama law).

199. Munson v. Raudonis, 387 A.2d 1174 (N.H. 1978).

200. G.J.D. v. Johnson, 713 A.2d 1127 (Pa. 1998).

201. 299 S.E.2d 8 (W.Va. 1982).

202. *Perry*, 299 S.E.2d at 12 (citing Hensley v. Erie Ins. Co., 283 S.E.2d 227 (W.Va. 1981)).

203. *Perry*, 299 S.E.2d at 12.

204. 679 S.W.2d 470 (Tex. 1984)

compensation was one of the aims of punitive damages, the same could be recovered from an estate.[205] The dissent noted that "the punitive and deterrent aims of exemplary damages are not separable . . . . When, through death, the tortfeasor is no longer subject to legal punishment, the general deterrent effect likewise is greatly diminished, if not completely frustrated."[206]

In *Ellis v. Zuck*,[207] the Fifth Circuit predicted that Alabama law would allow recovery of punitives from the estate of a deceased tortfeasor.[208] While an earlier state case had stated that such damages were not recoverable,[209] the Fifth Circuit treated the statement as dictum and rejected it.[210] The court relied upon the Alabama decision of *Shirley v. Shirley*[211] which held that a wrongful death action may be filed against a deceased tortfeasor's estate.[212] Because such a suit could only be brought for punitive damages, Ellis found that Alabama law would permit the recovery of punitives from an estate.[213]

In *Munson v. Raudonis*,[214] the court ruled that punitive damages were recoverable from a decedent's estate because such damages compensate the plaintiff as opposed to punishing the estate.[215]

In G.J.D. v. Johnson,[216] the court held that in the event a tortfeasor should die after suit is commenced against him, punitives are nevertheless recoverable against his estate. The court found that by imposing punitives upon a tortfeasor's estate, other members of society would be deterred from engaging in tortious conduct, thus advancing one of the goals of punitive damages.[217] The court further noted that safeguards were available, including informing the jury that the award was sought against the tortfeasor's estate and the availability of remittitur.[218]

The overwhelming number of jurisdictions to consider this issue

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205. *Hofer*, 679 S.W.2d at 475 (overruling Wright's Adm'x. v. Donnell, 34 Tex. 291 (1871) (prohibiting recovery of punitive damages from an estate)).
206. *Hofer*, 679 S.W.2d at 478.
207. 546 F.2d 643 (5th Cir. 1977).
208. *Ellis*, 546 F.2d at 644.
209. Meigham v. Birmingham Terminal Co., 51 So. 775, 777-78 (Ala. 1910).
210. *Ellis*, 546 F.2d at 644.
211. 73 So. 2d 77 (Ala. 1954)
212. Shirley, 73 So. 2d at 80.
213. Ellis, 546 F.2d at 644.
214. 387 A.2d 1174 (N.H.1978).
215. Munson, 387 A.2d at 1177-78.
216. 713 A.2d 1127 (Pa. 1998).
217. Johnson, 713 A.2d at 1131.
218. *Id.*

prohibit the imposition of punitives against a tortfeasor's estate. Jurisdictions espousing this viewpoint are Alaska,[219] Arizona,[220] California,[221] Colorado,[222] Florida,[223] Georgia,[224] Idaho,[225] Iowa,[226] Illinois,[227] Kansas,[228] Louisiana,[229] Maine,[230] Massachusetts,[231] Minnesota,[232] Mississippi,[233] Missouri,[234] Nevada,[235] New Mexico,[236] New York,[237] North Carolina,[238] Oklahoma,[239] Oregon,[240] Rhode Island,[241] Tennessee,[242] Vermont,[243] Virginia,[244] Wisconsin[245] and Wyoming.[246]

Those jurisdictions that preclude imposing punitive damages upon the estate of a deceased tortfeasor do so because the deceased cannot be punished or deterred. These jurisdictions reject the notion that while the deceased is no longer subject to punishment or deterrence, others may nevertheless be deterred from engaging in like conduct. "The deterrent effect of punitive damages on others . . . is inextricably tied to the punishment of the tortfeasor. If the tortfeasor cannot be punished, it follows that

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219. See Doe v. Colligan, 753 P.2d 144, 146 (Alaska 1988).

220. See Braun v. Moreno, 466 P.2d 60 (Ariz. Ct. App. 1970).

221. See CAL. CIV. PROC. CODE § 377.42 (West Supp. 1999) (prohibiting punitive damages against decedent's representative or successor).

222. See COLO. REV. STAT. § 13-20-101 (1999).

223. See Lohr v. Byrd, 522 So. 2d 845 (Fla. 1988).

224. See Morris v. Duncan, 54 S.E. 1045, 1046 (Ga. 1906).

225. See IDAHO CODE § 5-327 (1988).

226. See Rowen v. LeMars Mut. Ins. Co., 282 N.W.2d 639 (Iowa 1979).

227. *See* Stafford v. Purofied Down Prods. Corp., 801 F. Supp. 130 (N.D. Ill. 1992).

228. *See* Fehrenbacher v. Quackenbush, 759 F. Supp. 1516 (D. Kan. 1991) (predicting Kansas law).

229. *See* Johnson v. Levy, 47 So. 422 (La. 1908).

230. *See* Prescott v. Knowles, 62 Me. 277 (Me. 1874).

231. *See* MASS. GEN. LAWS ANN. ch. 230, § 2 (West 1985).

232. *See* Thompson v. Estate of Petroff, 319 N.W.2d 400 (Minn. 1982).

233. *See* MISS. CODE ANN. § 91-7-235 (1999).

234. *See* Ford Motor Credit Co. v. Hill, 245 F. Supp. 796 (W.D.Mo. 1965) (predicting Missouri law).

235. *See* Allen v. Anderson, 562 P.2d 487 (Nev. 1977).

236. *See* State Farm Mut. Auto. Ins. Co. v. Maidment, 761 P.2d 446 (N.M. 1988).

237. *See* N.Y. EST. POWERS & TRUSTS LAW § 11-3.2(1) (McKinney 1981).

238. *See* McAdams v. Blue, 164 S.E.2d 490 (N.C. Ct. App. 1968).

239. *See* Morriss v. Barton, 190 P.2d 451 (Okla. 1947).

240. *See* Pearson v. Galvin, 454 P.2d 638 (Ore. 1969).

241. *See* R.I. GEN. LAWS § 9-1-8 (1997).

242. *See* Hayes v. Gill, 390 S.W.2d 213 (Tenn. 1965).

243. *See* VT. STAT. ANN. tit. 14, § 1454 (1989).

244. *See* Dalton v. Johnson, 129 S.E.2d 647 (Va. 1963).

245. *See* WIS. STAT. ANN. 895.02 (West 1997).

246. *See* Mercante v. Hein, 67 P.2d 196 (Wyo. 1937).

there can be no general deterrence."[247] In addition, the Restatement (Second) of Torts also opines that punitive damages are not recoverable against a tortfeasor's estate.[248]

The policy goals of most jurisdictions are such that punitive damages are imposed to punish and deter.[249] With respect to innocent successors, the argument that punitive damages can serve as a general deterrent is shaky at best. Deterrence through punishment of the actual tortfeasor is logical. Punishment of a blameless entity is wrong. A majority of jurisdictions have found that the estate of a deceased tortfeasor cannot be punished or deterred by the imposition of punitive damages.

This makes sense. As one court stated, "[w]ith the wrongdoer dead, there is no one to punish, and to punish the innocent ignores our basic philosophy of justice."[250] In *Martin v. Johns-Manville*,[251] the defendant argued that it should not be liable for punitive damages based upon the conduct of its predecessor. While the court upheld a punitive award, it did so because the successor was not much changed from its predecessor.[252] The court noted that if the successor had different shareholders, officers and management than its predecessor, the successor would not have been subject to punitive damages.[253] The court stated "it would make little if any sense to impose punitive damages on the successor, for the actors responsible for the predecessor's reckless conduct . . . would neither be punished nor deterred from similar conduct by such an award."[254]

Case law has demonstrated a willingness to impose punitive damages on a successor in the limited instance when the successor is the result of a statutory merger,[255] based on the idea that a

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247. State Farm Mut. Auto Ins. Co. v. Maidment, 761 P.2d 446, 449 (N.M. Ct. App. 1988). *See also* Doe v. Colligan, 753 P.2d 144, 146 (Alaska 1988) ("Since the deceased tortfeasor cannot be punished, the general deterrent effect becomes speculative at best . . . .").

248. "Punitive damages are not awarded against the representatives of a deceased tortfeasor . . . ." RESTATEMENT (SECOND) OF TORTS § 908, cmt. a (1979).

249. There are jurisdictions in which compensation is an additional goal. *See* Jackovich v. Gen. Adjustment Bureau, Inc., 326 N.W. 2d 458 (Mich. App. Ct. 1982); Hofer v. Lavender, 679 S.W.2d 470 (Tex. 1984); Waterbury Petroleum Prods., Inc. v. Canaan Oil & Fuel Co., Inc., 477 A.2d 988 (Conn. 1984).

250. Lohr v. Byrd, 522 So.2d 845, 847 (Fla. 1988).

251. 469 A.2d 655 (Pa. Super. 1983), *rev'd on other grounds*, 494 A.2d 1088 (Pa. 1985).

252. *Martin*, 469 A.2d at 667.

253. *Id.* at 666.

254. *Id.*

255. *See, e.g.*, Hanlon v. Johns-Manville, 599 F. Supp. 376 (N.D. Iowa 1984); Davis v. Celotex Corp., 420 S.E.2d 557 (W.Va. 1992).

successor expressly undertakes liability for all liability of its predecessor. However, under *Brotherton*, the successor must have a real connection to the culpable conduct of its predecessor in order for punitives to be assessed.[256]

B. Vicarious Liability for Punitive Damages

Vicarious liability for punitive damages — quasi criminal punishment — is unfair.[257] Unlike compensatory damages, punitive damages focus on the culpability of the defendant. Under the complicity rule, punitive liability is warranted against an employer only when the owner or high management orders, participates in, or ratifies the misconduct of its employee or agent.[258] Under this rule, without complicity, punitive damages are prohibited.[259] Even in jurisdictions with the complicity rule the employer will remain liable for compensatory damages. This is a good analogy to the successor corporation who is innocent of misconduct. A successor ought not to be subject to punitive liability without some sort of "complicity" in the wrongdoing, e.g. retention of employees of the predecessor who engaged in the misconduct. Such complicity would, in effect, evince a ratification of the egregious behavior and, thus, warrant punitive liability.

Similarly, with respect to successors, only if a successor "ratified" the predecessor's conduct should punitive damages be imposed. If the successor continued the harmful conduct, acted in furtherance of the conduct, or had key personnel of the predecessor join the successor, one may find a complicity or ratification of the predecessor's conduct justifying an award of punitive damages against the successor. Absent such complicity, an

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256. *Brotherton*, 493 A.2d at 1341-42. *But see supra* note 36.

257. *See* Francis, *Criminal Responsibility of the Corporation*, 18 ILL. L. REV. 305, 316-17 (1930) (" 'Guilt is personal . . . . So, where an agent . . . commits a crime, as difficult as is the question of authorization or inducement, we do not saddle the crime on the principal unless we can in some way prove him a party to the crime.").

258. *See, e.g.*, Lake Shore & M.S.R.R. v. Prentice, 147 U.S. 101, 107 (1892).

259. RESTATEMENT (SECOND) OF TORTS § 909 states:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
>
> (a) the principal or a managerial agent authorized the doing and the manner of the act, or
>
> (b) the agent was unfit and the principal or managerial agent was reckless in employing or retaining him, or
>
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
>
> (d) the principal or managerial agent of the principal ratified or approved the act.

innocent successor ought not to be saddled with punitive liability for the conduct of its predecessor.

CONCLUSION

In jurisdictions where the only goals of punitive damages are punishment and deterrence, allowing punitive damages to be levied against an innocent successor is wrong because neither goal is served. Quasi-criminal in nature, punitives ought not to be assessed against blameless parties. Imposing punitive damages on a successor innocent of wrongdoing is, thus, inconsistent with the goals of punitive damages. When the successor has liability for compensatory damages, different objectives are in play. Moreover, failure to punish an innocent successor through the imposition of punitive damages will not allow the guilty entity to escape punishment. Bad faith transfers, fraudulent conveyances and de facto mergers remain viable conduits to impose punitive damages upon a successor corporation should the actual wrongdoers attempt to employ "corporate machinations" to escape punitive liability.[260]

The product line theory likewise does not justify the imposition of punitive damages upon innocent successors. Three of the four justifications are not part of the punitive context.[261] The fourth, the cost bearing, is not a legitimate basis because compensatory damages are separate from and not a part of punitive damages. While the *Brotherton* continuity of enterprise exception provides a better justification, it too does not truly provide a viable basis for punitive liability. In a continuity of enterprise situation, the successor does not deprive the plaintiff of a remedy, as compensatory damages are available. In addition, punitive liability is arguably not taken into account by the continuity of enterprise exception. Finally, the test does not take into account fault, the very touchstone of punitive liability.

Mergers present adequate policy reasons for imposing compensatory damages. However, mergers alone are insufficient to impose punitive liability. There must additionally be proof of fault, such as a perpetuation of the misconduct or knowledge of the

260. Each of these doctrines requires the involvement of the predecessor's wrongdoers in the successor and, thus, those guilty of the misconduct will be punished and the goals of punitive liability advanced.

261. The successor did not place the product in commerce, did not warrant it and, unless notice was provided to it, did not have the ability to cure the defect.

defect without placing a warning on the product, in order for there to exist adequate grounds for imposing punitive damages upon a successor. In contrast, if a successor eliminates the product and/or management of its predecessor, the mere fact that a merger occurred should be insufficient justification to impose punitive liability on a successor. Rather, the focus should be on the fault of the successor. This will comport with both corporate law's goal of certainty and the goals of punitive damages.

A rule whereby only the entity guilty of the misconduct is saddled with punitives is fair. Such a rule would not allow tortfeasors to escape from punitive damages because the focus in the consideration of whether punitives are appropriate is on conduct. The successors to fraudulent mergers and de facto mergers, as well as "new hat" successors, would remain subject to punitive damages because the participants in the wrongful conduct of the predecessor continue in the new ventures. Furthermore, the focus in a punitive damage determination ought to be on a successor's conduct as opposed to the form of the transaction. Some courts have recognized the importance of conduct and have moved away from the rigid imposition of punitives based solely on the transaction.[262] Rather than the form of the transaction controlling, courts should evaluate the conduct of the successor corporation and the circumstances surrounding the transaction to determine whether levying punitive damages on the successor corporation furthers the twin purposes of punitive damages, i.e., punishes an entity that has engaged in wrongdoing and deters others from engaging in like misconduct.

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262. *Compare In re* Related Asbestos Cases, 566 F. Supp. 818, 824 (N.D. Cal. 1983) (finding that liability for punitive damages would be inappropriate because the successor did not engage in tortious conduct) *with* Martin v. Johns-Manville Corp., 469 A.2d 655, 667 (Pa. Super. 1983), *rev'd on other grounds*, 494 A.2d 1088 (Pa. 1985). (stating that simply because the successor did not continue manufacturing the product, it is not exonerated from punitive damages liability).